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***1] The People of the State of New York, against [REDACTED], Defendant.

CRIMINAL COURT OF THE CITY OF NEW YORK, KINGS COUNTY

37 Misc. 3d 1209(A); 2012 N.Y. Misc. LEXIS 4858; 2012 NY Slip Op 51944(U)

October 15, 2012, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

HEADNOTES

[*1209A] Crimes--Arrest--Probable Cause--Officers Found to be Not Credible.

COUNSEL: [*1] For the People, Charles J. Hynes, District Attorney, Kings County, by Charlotte Owens, Esq., Assistant District Attorney.

For the Defendant, Timothy Gumkowski, Esq., Brooklyn Defender Services.

JUDGES: Hon. John H. Wilson, JCC.

OPINION BY: John H. Wilson

OPINION

John H. Wilson, J.

Defendant is charged with Attempted Criminal Possession of a Controlled Substance in the Seventh Degree (*PL Sec. 110/220.03*), and Criminal Possession of Marijuana in the Fifth Degree, both Class B Misdemeanors, as well as Unlawful Possession of Marijuana (*PL Sec. 221.05*), a violation.¹

¹ Defendant was initially charged with Criminal Possession of a Controlled Substance in the Seventh Degree, however, on May 30, 2012, on motion of the People, that charge was reduced to the Attempt.

On the consent of the People, a hearing was held in this matter on May 30, 2012 and September 13, 2012, pursuant to *Dunaway v. New York*, 442 U.S. 200, 99 S Ct 2248, 60 L Ed2d 824 (1979) and *Mapp v. Ohio*, 367 U.S. 643, 81 S Ct 1684, 6 L Ed2d 1081, 86 Ohio Law Abs. 513 (1961).

At the hearing, the People offered the testimony of two witnesses; Police Officer Deven Okvist, and Police Officer Roman Goris. The Defense offered no testimony, but did place into evidence two photographs of the location [*2] where Defendant was arrested. [***2]

Based upon the testimonial evidence offered by the People at the hearing, this Court finds both Officers not credible. The People have therefore failed to establish probable cause for Defendant's arrest. The evidence collected by the police must be suppressed.

The Court makes the following specific findings of fact:

Police Officer Deven Okvist testified that he is assigned to the 77 Precinct. See, Transcript of Hearing dated May 30, 2012, p 9. He has made approximately 50 arrests for criminal possession of marijuana in his four year career with the New York City Police Department, and has received training in the identification of marijuana. See, Transcript of Hearing dated May 30, 2012, p 9-10.

On June 25, 2011, he was working in uniform. See, Transcript of Hearing dated May 30, 2012, p 10. While driving eastbound on St John's Place, Brooklyn, New York, "a call came over the radio involving three male blacks smoking marijuana." See, Transcript of Hearing dated May 30, 2012, p 11. That call was received "ap-

proximately 30 minutes prior" to the arrest of Defendant. See, Transcript of Hearing dated May 30, 2012, p 11.

At approximately 7:20 PM, Officer Okvist [**3] arrived at the location to which he was allegedly directed by the call, [REDACTED], Brooklyn, NY. The Officer testified that "at this point, we proceeded to go over there. We observed two defendants in possession of a marijuana cigarette. There was a very strong smell at this point. We went over to stop the defendant. Once we made eye contact, he flicked the marijuana cigarette over his right shoulder." See, Transcript of Hearing dated May 30, 2012, p 11.

The Officer then identified Defendant as the person who "flicked" the marijuana away. See, Transcript of Hearing dated May 30, 2012, p 11. He testified that he recovered the marijuana from "the ground where the defendant threw it." See, Transcript of Hearing dated May 30, 2012, p 11.

On cross examination, Officer Okvist repeated that "a radio run came over the radio," the location given was "417 St John's," and the description was "three male blacks smoking marijuana." See, Transcript of Hearing dated May 30, 2012, p 12-13. When he received the call, he was "patrolling in a marked van. I don't know where. Somewhere in the 77." See, Transcript of Hearing dated May 30, 2012, p 13.

Upon arriving at the scene, Officer Okvist observed [**4] a group of three black males from "approximately 15 yards away." See, Transcript of Hearing dated May 30, 2012, p 20. Defendant was "leaning up against a black fence...with a marijuana cigar in his right hand." See, Transcript of Hearing dated May 30, 2012, p 21. The Officer stated that from 15 yards away, "there was a strong smell of marijuana coming from the area." When asked by Defense Counsel "when did you smell that strong smell of marijuana," the Officer stated, "when I saw the defendant." See, Transcript of Hearing dated May 30, 2012, p 24. [***3]

The only description Officer Okvist could give of the other two individuals, one of whom was subsequently arrested for possession of marijuana, was "black males." See, Transcript of Hearing dated May 30, 2012, p 25.²

2 The third male black of the group was not arrested. See, Transcript of Hearing dated May 30, 2012, p 20.

After collecting the marijuana from the ground, Officer Okvist gave it to Officer Goris. See, Transcript of Hearing dated May 30, 2012, p 28.

The People's next witness was Police Officer Roman Goris. Officer Goris, also assigned to the 77 Precinct, has also been with the NYPD for four years, has made ap-

proximately 60 arrests [**5] for possession of marijuana, and has also received training in the identification of marijuana. See, Transcript of Hearing dated May 30, 2012, p 42. He also received training in the identification of controlled substances, and had made approximately 10 arrests for the possession of controlled substances. See, Transcript of Hearing dated May 30, 2012, p 42-43.

On June 25, 2011, Officer Goris remembered "encounter(ing) three people in front of [REDACTED]," Brooklyn, NY at approximately 7:20 PM. See, Transcript of Hearing dated May 30, 2012, p 44. The Officer stated "we saw him coming out of the building. I saw (defendant) leaning on a fence smoking weed." See, Transcript of Hearing dated May 30, 2012, p 44.

After Defendant's arrest, Officer Goris took him back to the 77 Precinct. See, Transcript of Hearing dated May 30, 2012, p 45. During a search of Defendant's wallet, "I observed a plastic straw with a white, powdery substance, residue." In his opinion, the Officer believed this substance to be cocaine. See, Transcript of Hearing dated May 30, 2012, p 46.

Upon cross examination, Officer Goris was asked if he could recall "why you were driving on St. John's Place at that time?" [**6] The Officer stated "patrolling the street." See, Transcript of Hearing dated May 30, 2012, p 48. He also stated that he was "five feet, ten feet" away from Defendant when he observed him throw the marijuana away. When the Officer described the distance as "from here to the Defendant," the Court noted the distance between the witness and the Defendant was "approximately 15, 17 feet." See, Transcript of Hearing dated May 30, 2012, p 49.

When asked to describe the other two individuals, Officer Goris could not remember what they looked like, or what they were wearing." See, Transcript of Hearing dated May 30, 2012, p 52.

Officer Goris also indicated that there was "a strong smell of marijuana," at the time he and Officer Okvist stopped the police van. See, Transcript of Hearing dated May 30, 2012, p 57. [***4]

Once the People rested, the Court instructed the People to provide the defense with the "arrest paperwork" for the other individual arrested at the same time as Defendant. The People's witnesses were subject to recall pending Defendant's review of the requested discovery. See, Transcript of Hearing dated May 30, 2012, p 64-65.

On May 31, 2012, the defense requested, in writing, that the People [**7] produce "the radio run and accompanying SPRINT report that was mentioned in Officer Okvist's testimony." See, letter of May 31, 2012, Court file.

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The hearing was resumed on September 13, 2012. Based upon the People's production of the arrest documentation for the other individual arrested at the same time as this Defendant, Defendant recalled both Officers to the stand.

Returning to the stand, Police Officer Okvist stated that he observed the other individual, who was also arrested for possession of marijuana at "approximately the same time" as his observation of Defendant. See, Transcript of Hearing dated September 13, 2012, p 5. Yet, he could not remember what this individual looked like. See, Transcript of Hearing dated September 13, 2012, p 3. He could not recall if he "recovered the marijuana on the other individual." See, Transcript of Hearing dated September 13, 2012, p 6. Only after being shown a document to refresh his recollection could Officer Okvist recall that he recovered a ziplock of marijuana from the person of the other individual arrested at the same time as Defendant. See, Transcript of Hearing dated September 13, 2012, p 7-8.

Officer Okvist was unable to identify a [**8] photograph of the exterior of [REDACTED]. See, Transcript of Hearing dated September 13, 2012, p 13. He had no recollection of the location where he arrested Defendant. See, Transcript of Hearing dated September 13, 2012, p 14.

Officer Goris' memory regarding the other individual arrested was no better. He did not know the name of the person. See, Transcript of Hearing dated September 13, 2012, p 15. He did not recall that a ziplock of marijuana was recovered from that person. See, Transcript of Hearing dated September 13, 2012, p 17. He did not recall being given the ziplock of marijuana. See, Transcript of Hearing dated September 13, 2012, p 19.

Unlike Officer Okvist, Officer Goris was able to identify a photograph of the location where Defendant was arrested. See, Transcript of Hearing dated September 13, 2012, p 23. However, he could not recall what the other individual looked like, whether that individual dropped anything, or whether he was also observed smoking marijuana, despite that individual being arrested at the same time as Defendant. See, Transcript of Hearing dated September 13, 2012, p 24-25.

At the conclusion of the evidence, the Court asked the People to [**9] produce proof of the radio run that Officer Okvist testified had brought him and his partner to the location of the [**5] arrest. See, Transcript of Hearing dated September 13, 2012, p 42. The People informed the Court that "the Sprint report was not able to be located." The Court asked again, "All right. I want to be clear. You don't have the radio run?" The People answered, "Yes, that is right." See, Transcript of Hearing dated September 13, 2012, p 43.

Based upon these facts, the Court makes the following findings;

A "(d)etermination of the facts and circumstances bearing on the issue (of probable cause) ...hinges primarily on questions of witness credibility, (which is) a question of fact." See, *People v. Morales*, 42 NY2d 129, 134, 366 N.E.2d 248, 397 NYS2d 587 (1977). When the witness exhibits an inconsistent memory of the events to which he testifies, "it undermines the credibility of his memory." See, *People v. Creer*, 31 Misc 3d 1, 4, 919 NYS2d 261 (App Term, 1st Dept, 2010) (Schoenfeld, J, in dissent). See, also, *In Re Robert D.*, 69 AD3d 714, 717, 892 NYS2d 523 (2d Dept, 2010) ("evidence adduced at the hearing was contradictory and not credible with respect to the material facts necessary to establish [**10] probable cause") (citations omitted).

In this matter, neither officer was credible.

Officer Okvist testified clearly and repeatedly that he and his partner were drawn to the location of Defendant's arrest by a radio call of three black males smoking marijuana. Yet, not only were the People unable to produce any record of any such call, his partner, Officer Goris, contradicted that testimony, and indicated they were on a routine patrol.

Based upon the People's inability to locate any record of any radio call, this Court is left with no alternative but to hold Officer Okvist's memory as incorrect regarding the events which brought him to the scene of Defendant's arrest.

Further, the inability of both officers to recall any details of the arrest of an individual who was taken into custody at the same time as this Defendant defies credibility. Officer Okvist's inability to identify a photograph of the location of Defendant's arrest is also without any semblance of truthfulness.

It is also highly unlikely that Officer Okvist would be able to smell a strong odor of marijuana from a distance of 15 yards, particularly when his partner indicates their van was only 15 to 17 feet away from Defendant [**11] at the time this observation was made.

Since this Court finds both Officers to have not been credible, "probable cause cannot be established because the officer's claimed observations are suspect." See, *People v. Isaac*, 7 Misc 3d 1004[A], 801 NYS2d 239, 2005 NY Slip Op 50440[U] (S Ct, Qns Cty, 2005) (citations omitted). Without probable cause, the evidence collected by the police must be suppressed. See, *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S Ct 407, 9 L Ed2d 441 (1963).

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All other arguments advanced by the People and Defendant have been reviewed [***6] and rejected by this Court as being without merit.

Dated: Brooklyn, New York October 15, 2012
Hon. John H. Wilson, JCC

This shall constitute the opinion, decision, and order of the Court.